



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 198 OF 2014**

AMOS NJOROGE KAMWERU..... 1<sup>ST</sup> APPLICANT  
STEPHEN KANYUIRA .....2<sup>ND</sup> APPLICANT  
GERALD GIKONYO.....3<sup>RD</sup> APPLICANT  
DENNIS K. WANGUI.....4<sup>TH</sup> APPLICANT  
PATRICK NJIMU MWANGI.....5<sup>TH</sup> APPLICANT  
PROFESSOR I. M. MBEICHE.....6<sup>TH</sup> APPLICANT

VERSUS

KAJIADO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT  
NATIONAL ENVIRONMENT  
MANAGEMENT AUTHORITY.....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF EDUCATION,  
SCIENCE & TECHNOLOGY.....3<sup>RD</sup> RESPONDENT

AND

FRANCIS MACHARIA WAITHAKA.....1<sup>ST</sup> INTERESTED PARTY  
GRACE WATHANU MACHARIA.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

Coming up before me for determination is the Notice of Preliminary Objection dated 26<sup>th</sup> February 2014 in which the 2<sup>nd</sup> Respondent raised the following objections:

1. That the Petitioners' claim against the 2<sup>nd</sup> Respondent lacks merit, is bad in law, is fatally defective and is a clear abuse of the judicial process.
2. That the court lacks jurisdiction on this matter since Part XII Section 125(1) of the Environmental Management and Coordination Act (hereinafter referred to as the "EMCA") establishes the National Environment Tribunal (hereinafter referred to as the "NET") to review administrative decisions made by National Environmental Management Authority (hereinafter referred to as "NEMA") relating to issuance, revocation or denial of license and conditions of license.
3. That the Environment and Land Court (hereinafter referred to as the "ELC") powers can only be invoked in its appellate jurisdiction.

The 2<sup>nd</sup> Respondent filed their written submissions dated 24<sup>th</sup> March 2014 in which they stated that **section 129(1) of the EMCA** is categorical that appeals or a challenge of a NEMA decision lies with the NET as the forum of the first instance and not with the ELC. They further submitted that section 130 of the EMCA provides that the appeals from the NET shall be to the High Court (now ELC). They cited the decision of the Court of Appeal in **Republic versus NEMA (2011) eKLR (Civil Appeal No. 84 of 2010)**.

The Interested Parties filed their written submissions on the Preliminary Objection dated 27<sup>th</sup> March 2014 stating that they support the preliminary objection of the 2<sup>nd</sup> Respondent to the effect that although the Ex-Parte Applicants are not aggrieved parties as envisaged by **section 129(1) of the EMCA**, they have the right under **section 129(2) of the EMCA** to appeal against the decision of NEMA to the NET. They submitted that this was so held by Justice Odunga in **Civil Miscellaneous Application No. 155 of 2012 R. versus The NET**. It was their further submission that although the availability of an alternative remedy is not a bar to an application for Judicial Review, the Applicants must demonstrate existence of exceptional circumstances to remove the case from the appeal process set out in the EMCA which position they stated was given in the **Court of Appeal Civil Appeal No. 84 of 2010 R. versus NEMA**. They went on to state that the Applicants have not in the application for leave demonstrated the existence of exceptional circumstances to warrant skipping the appeal process set out in EMCA.

The Ex-Parte Applicants filed their written submissions dated 2<sup>nd</sup> April 2014 in which they stated that the preliminary objection is expressed to be based upon **section 129 of the EMCA** which applies to an applicant for a NEMA License who has been aggrieved by the decision either to refuse to grant him a license at all, imposition of conditions on a license, revocation of a license, challenge the fees attached to a license or imposition of an environment restoration order. They submitted further that in that regard, it is the Interested Parties who would have appealed to the NET under that provision of the law. They further submitted that they are not applicants for a NEMA license in this case but are just third parties who have been affected by the decision of the 2<sup>nd</sup> Respondent to grant the Interested Parties a NEMA license. They pointed out that **section 129(1) of the EMCA** does not apply to them and that the 2<sup>nd</sup> Respondent did not point out any section in the EMCA requiring third parties aggrieved by a NEMA License to approach the NET. The Ex-Parte Applicants went further to submit that there is a special circumstance in this case that would have, of necessity, compelled them to come to this court for Judicial Review instead of going to the NET even if it had jurisdiction. They stated that the Ex-parte Applicants have also sued the 1<sup>st</sup> and 3<sup>rd</sup> Respondents which are public bodies and also licensing authorities just like NEMA. They submitted that the provisions of EMCA do not apply to their licensing procedures and that the dispute as between them and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents cannot be adjudicated by the NET as it has no jurisdiction.

I am called upon to determine whether this court has jurisdiction to hear and determine this suit in light of the provisions of section 129 of the EMCA. I will first address the argument by the Ex-parte Applicants that they are not applicants of a NEMA license and therefore not captured under section 129 of the EMCA. To that point, I disagree. My authority is the decision of Justice Odunga in **Civil Miscellaneous Application No. 155 of 2012 R. versus The NET** where he found that under **section 129(1) of the EMCA**, a person who did not participate in the EIA study process cannot be said to have been aggrieved

by the process which led to the issuance of the license as no decision could be said to have been made against him hence could not challenge the decision by way of an appeal to the NET. However, in the same case, Justice Odunga held that whereas section **129(1) of the EMCA** deals with appeals by a person who applied for a license, subsection (2) deals with all other persons who are aggrieved by the decision of the Director General, the Authority or a Committee which is the category in which the Ex-parte Applicants fall. I therefore find that the Ex-parte Applicants may challenge the decision to award a NEMA license before the NET under **section 129(2) of the EMCA**.

The second point is the question whether the Ex-parte Applicants have only one avenue of relief being the NET or they could still pursue relief before this court as they have done. The Court of Appeal in **Civil Appeal No. 84 of 2010 R. versus NEMA** had this to say:

**“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”**

In this particular case, the Ex-parte Applicants have stated that this particular case is fit for consideration before this court in Judicial Review proceedings as opposed to pursuing an appeal through the NET for the reason that exceptional circumstances do exist being the fact that they are pursuing relief against not just the 2<sup>nd</sup> Respondent but also against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents which also issued licenses to the Interested Parties. They submitted that the provisions of EMCA do not apply to these licensing procedures and that the dispute as between them and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents cannot be adjudicated by the NET as it has no jurisdiction. I have given considerable thought to this submission and do find that there is indeed merit in it. The Ex-parte Applicants seek for the licensing decisions of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents addressed alongside the licensing decision of the 2<sup>nd</sup> Respondent. I consider that these qualify as exceptional circumstances warranting allowing the Ex-parte Applicants to pursue this suit by way of Judicial Review and I do so find.

Accordingly, the Preliminary Objection is hereby dismissed. Costs shall be in the cause.

**DELIVERED AND DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**